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on appeal, that a new executory contract which includes the settlement of the original claim, is not a mere accord, but is the substitute for the original claim or contract, which is merged in it, and may be specifically enforced in a proper case. *Moers v. Moers* (1920, N. Y.) 128 N. E. 202.

This case in the lower court was criticised adversely in (1919) 29 YALE LAW JOURNAL, 114. For a discussion of similar points involved, see (1920) 29 *id.* 924.

CONTRACTS—OPTIONS—REVOCATION OF AN "EXCLUSIVE AGENCY TO REAL ESTATE."—The plaintiffs had by written agreement secured the exclusive agency to the defendant's real estate for forty days, during which time the defendant himself sold it and gave notice to the plaintiffs. The latter brought this action for their commission. *Held,* that the agreement was revocable and that the plaintiffs were not entitled to commission. *Beck v. Howard* (1920, S. D.) 178 N. W. 579.

The question involved is not really a question of agency but one of contracts. The court had to decide whether this was an offer, revocable or irrevocable, or whether it was a contract complete. See COMMENT (1919) 28 YALE LAW JOURNAL, 575.

CRIMINAL LAW—JURISDICTION OF FEDERAL COURTS—EFFECT OF ABSENCE OF PENALTY IN THE FOOD CONTROL ACT.—The defendant, a retail grocer, was charged with selling sugar at an unfair rate, in violation of section four of the Food Control Act of August 10, 1917. The defendant pleaded guilty and was convicted. *Held,* on appeal, that the indictment did not charge a criminal offense, because the Act prescribed no penalty for its violation. *Mossew v. United States* (1920, C. C. A. 2d) 266 Fed. 18.

See COMMENTS, *supra,* p. 81.

PROPERTY—EASEMENTS—RIGHT TO WATER FROM SPRING AS EASEMENT IN GROSS—MERE NON-USER NOT AN ABANDONMENT.—A grant was made of the privilege to take water from a spring, the grantors covenanting that they would not sell to others such privilege or take water themselves "to supply any persons that the parties acting under this deed will supply" except by agreement of all parties interested. There was evidence of non-user for many years. *Held,* that the privilege still existed, but did not pass merely by a conveyance of the grantee's land. *Clement v. Rutland Country Club* (1920, Vt.) 108 Atl. 843.

The court held that the "right" was a profit á prendre, which is always assignable or devisable, and that since the parties contemplated the sale of water, it was not appurtenant to any land and hence was in gross. This seems a correct interpretation of the intention of the parties. See, however, *Chase v. Cram* (1916) 39 R. I. 83, 97 Atl. 481, L. R. A. 1918F, 444, note, where a conveyance by a father to his daughter of part of his farm, with "a privilege to take water from the spring on my farm as occasion may require," was held appurtenant, so that she could not sell the water from the spring. As to profits in gross or appurtenant, see (1919) 29 YALE LAW JOURNAL, 218; (1920) *id.* 696. The court in the instant case also holds what, in spite of some conflict, is the better rule, that a servitude is not lost by mere non-user. An intention to abandon is requisite and this is not to be inferred from such non-user alone. See *New York Central & H. R. Ry. v. City of Chelsea* (1912) 213 Mass. 40, 99 N. E. 455; *Pratt v. Sweetser* (1878) 68 Me. 344.

PROPERTY—EASEMENTS—PRESCRIPTIVE RIGHT OF WAY TO WATER AS EASEMENT IN GROSS.—Claiming a right of way through a passway over defendant's land from the highway to a water course as an easement appurtenant to each of their tracts of land, used under a claim of right for more than the pre-

scriptive period, plaintiffs sue for an injunction against interference with their use of the passway. Plaintiffs own small farms along a highway from one to three miles distant from the passway and they or their grantors would occasionally drive down the public road and use the passway to get water for their stock and for family use. *Held,* that only those plaintiffs who had *themselves* used the passway for the prescriptive period under a claim of right were entitled to relief. *Thomas v. Brooks* (1920, Ky.) 221 S. W. 542.

The rationale of the decision is that the easements were not appurtenant to the plaintiffs' lands, but were in gross and personal only. The court approves *Graham v. Walker* (1905) 78 Conn. 130, 61 Atl. 98, to the effect that it is not indispensable even to a prescriptive easement appurtenant that one of its termini should be on the dominant estate, but it points out that there was nothing in the character of the use to bring home to the defendant that it was a necessary incident to the plaintiffs' farms. This seems an eminently just and satisfactory way of treating what would otherwise have been unfairly burdensome encumbrances on the defendant's land. For the distinctions between easements in gross and appurtenant and the conflict as to the assignability of easements in gross, see (1919) 29 YALE LAW JOURNAL, 218.

REAL PROPERTY—VESTED REMAINDERS—VALIDITY OF ASSIGNMENT.—The testatrix gave her estate in trust, the income to be used to support her son during his life, and after his death, or her own should she survive him, the estate to go to X. The plaintiffs claim title under two assignments from X and the defendants claim title as trustees under the will. *Held,* that the estate devised to X was a vested, not a contingent remainder, and that her assignment thereof to the plaintiffs was valid. *Real Est. Title & Ins. Co. v. Dearborn et al.* (1920, Me.) 109 Atl. 816.

The court followed, apparently, the well-settled rules that a remainder will be construed as vested rather than contingent whenever possible, and that a remainder is vested if it is of a kind which will take effect in possession whenever and however the preceding particular estate determines. Gray, *Rule Against Perpetuities* (3d ed. 1915) secs. 105-108. *In Re Whitney's Estate* (1917) 176 Calif. 12, 167, Pac. 399. By this construction the court avoided the necessity of determining the transferability of contingent remainders and followed the well-settled rule, to which judicial history of that very jurisdiction has long contributed, that vested remainders are fully transmissible as other species of property.—*Woodman v. Woodman* (1896) 89 Me. 131, 35 Atl. 1037. As to the transmissibility of remainders—contingent and vested—see 1 Tiffany, *Real Property* (2d ed. 1920) secs. 135-147.

SALES—NO RIGHT TO COUNTERCLAIM FOR DAMAGES REASONABLY PREVENTABLE.—The plaintiff sued to recover damages resulting from the defendant's refusal to accept and pay for a carload of flour. The defendant counterclaimed damages on account of the defective quality of a portion of another carload of flour. The plaintiff contended that the defendant was under a *duty* to mitigate his damage by using the flour in the way which would occasion the least possible loss. *Held,* that the defendant should recover on his counterclaim as the defendant was merely under a legal *disability* to counterclaim for damages which he ought to have prevented. *Rock v. Vandine* (1920, Kan.) 189 Pac. 157.

This is the first decision to stamp its approval on the Hohfeldian method of analysis. Hohfeld, *Some Fundamental Legal Conceptions* (1913) 23 YALE LAW JOURNAL, 16, (1917) 26 *id.* 710. The legal relation which is most involved in the instant case is perhaps a *no-right;* i. e. the defendant has no right to damages which he reasonably might have prevented. At the same time, as the court indicates, the defendant is under a *disability* to create in the plaintiff